

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NARISSA MELERO,

Plaintiff,

v.

GABRIEL RUIZ, et al.,

Defendants.

Case No. 1:21-cv-01226-NONE-EPG

FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT THIS ACTION BE
DISMISSED WITHOUT PREJUDICE FOR
FAILURE TO PROSECUTE AND FAILURE
TO COMPLY WITH A COURT ORDER

(ECF Nos. 1, 6)

OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN DAYS

I. BACKGROUND

Plaintiff Narissa Melero (“Plaintiff”) is proceeding *pro se* and *in forma pauperis* in this action. Plaintiff filed a complaint on August 13, 2021. (ECF No. 1.) The complaint alleges claims against Gabriel Ruiz, Jose Vargas, and the County of Fresno Child Protective Services related to the removal of Plaintiff’s child. (*Id.*)

On October 19, 2021, the Court entered an order screening Plaintiff’s complaint and found that it stated a cognizable Fourteenth Amendment due process claim against Defendant Ruiz but failed to state any other claims. (ECF No. 6.) The Court gave Plaintiff thirty days from the date of service of the order to file an amended complaint, notify the Court that she wants to go forward only on the claim found cognizable, or notify the Court that she wants to stand on his complaint. (*Id.* at 9-10.) Because the complaint was not signed, the Court also directed Plaintiff to either

1 lodge a signed copy of her complaint or sign any amended complaint. (*Id.* at 10.) The Court
2 warned Plaintiff that “[f]ailure to comply with this order may result in the dismissal of this
3 action.” (*Id.*)

4 The thirty-day period has expired, and Plaintiff has not filed an amended complaint or
5 otherwise responded to the Court’s order. Accordingly, for the reasons described below, the Court
6 will recommend that Plaintiff’s case be dismissed for failure to comply with a court order and
7 failure to prosecute.

8 **II. SUMMARY OF PLAINTIFF’S COMPLAINT**

9 The complaint names Gabriel Ruiz, Jose Vargas, and County of Fresno Child Protective
10 Services as defendants. Plaintiff alleges as follows:¹

11 Around April/May of 2021, the defendants wrongfully and fraudulently took Plaintiff’s
12 child from her without justification under the false premise that Plaintiff was under the influence
13 of narcotics. Plaintiff took CPS to trial and they lost, yet the defendants continue to deprive
14 Plaintiff of access to her children and are even going as far as to place the child up for adoption,
15 which is against Plaintiff’s civil rights. Plaintiff has not engaged in any conduct that would
16 warrant this action to be taken against her and yet the defendants are using false and fraudulent
17 pretenses to disadvantage Plaintiff. Defendants are using legalese and prejudice to preclude the
18 Plaintiff from a reasonable opportunity to defend herself from the instant due process violations.

19 Plaintiff’s five-month-old son is still in foster care despite the defendants lying and saying
20 Plaintiff had meth in her system without any proof of the same. This was taken to trial and CPS
21 lost. Plaintiff even went to school in a program for parenting classes and has completed the same.
22 Plaintiff’s mother is a probation of youth officer for CPS and even the manager tried to resolve
23 the issue to no avail. The social worker hasn’t communicated with Plaintiff in four months. The
24 foster parents have the child in sweatpants when its 98 degrees outside. They do not even have
25 clothes for him and they never use the clothes Plaintiff buys. Also, the care provider kept
26 Plaintiff’s son in the van with no windows down or AC while at CVS which is tantamount to
27 child abuse. A video surfaced where the foster parent almost drops the child physically because

28 ¹ Portions of the text in Plaintiff’s complaint are cut off or obscured. (See ECF No. 1 at 4.) The following summary includes the allegations that are legible.

1 they were carrying them in a negligent and reckless manner. The child has bruises and scratches
2 on their person.

3 The complaint attaches several exhibits, including medical records, a handwritten letter, a
4 certificate of completion for the Fresno Family Connections Parenting Program, and
5 correspondence with social worker Gabriel Ruiz.

6 **III. FAILURE TO PROSECUTE AND COMPLY WITH A COURT ORDER**

7 “In determining whether to dismiss a[n] [action] for failure to prosecute or failure to
8 comply with a court order, the Court must weigh the following factors: (1) the public’s interest in
9 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
10 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
11 public policy favoring disposition of cases on their merits.” *Pagtalunan v. Galaza*, 291 F.3d 639,
12 642 (9th Cir. 2002) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

13 ““The public’s interest in expeditious resolution of litigation always favors dismissal.” *Id.*
14 (quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly, this
15 factor weighs in favor of dismissal.

16 As to the Court’s need to manage its docket, “[t]he trial judge is in the best position to
17 determine whether the delay in a particular case interferes with docket management and the
18 public interest.... It is incumbent upon the Court to manage its docket without being subject to
19 routine noncompliance of litigants....” *Pagtalunan*, 291 at 639. Plaintiff has failed to respond to
20 the Court’s screening order. This failure to respond is delaying the case and interfering with
21 docket management. Therefore, the second factor weighs in favor of dismissal.

22 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in
23 and of itself to warrant dismissal.” *Id.* at 642 (citing *Yourish*, 191 F.3d at 991). However, “delay
24 inherently increases the risk that witnesses’ memories will fade and evidence will become stale,”
25 *id.* at 643, and it is Plaintiff’s failure to comply with a court order and to prosecute this case that
26 is causing delay. Therefore, the third factor weighs in favor of dismissal.

27 As for the availability of lesser sanctions, at this stage in the proceedings there is little
28 available to the Court which would constitute a satisfactory lesser sanction while protecting the
Court from further unnecessary expenditure of its scarce resources. Considering Plaintiff’s *in*

1 *forma pauperis* status, monetary sanctions are of little use. And, given the stage of these
2 proceedings, the preclusion of evidence or witnesses is not available.

3 Additionally, the Court recommends dismissal without prejudice. Because the dismissal
4 being considered in this case is without prejudice, the Court is stopping short of using the harshest
5 possible sanction of dismissal with prejudice.

6 Finally, because public policy favors disposition on the merits, this factor weighs against
7 dismissal. *Id.*

8 After weighing the factors, the Court finds that dismissal without prejudice is appropriate.

9 **IV. CONCLUSION AND RECOMMENDATIONS**

10 The Court screened Plaintiff's complaint and found that it stated a cognizable Fourteenth
11 Amendment due process claim against Defendant Ruiz but otherwise fails to state any other
12 claims. The Court previously provided Plaintiff with relevant legal standards and leave to amend
13 her complaint to cure these deficiencies. (ECF No. 6.) Alternatively, Plaintiff was provided an
14 opportunity to either notify the Court that she wishes to proceed on the claim found cognizable in
15 the screening order or that she wants to stand on her complaint. However, the deadline for
16 Plaintiff to respond to the screening order has passed and Plaintiff has not filed an amended
17 complaint, responded to the Court's screening order, or otherwise prosecuted this action.
18 Accordingly, the Court recommends that this action be dismissed without prejudice for failure to
19 prosecute and failure to comply with a court order.

20 Based on the foregoing, the Court HEREBY RECOMMENDS that:

- 21 1. This action be dismissed without prejudice for failure to prosecute and failure to
22 comply with a court order; and
- 23 2. The Clerk of Court be directed to assign a district judge for the purpose of closing
24 this case and then to close this case.

25 These findings and recommendations will be submitted to the United States district judge
26 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen
27 (14) days after being served with these findings and recommendations, Plaintiff may file written
28 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
Findings and Recommendations." Plaintiff is advised that failure to file objections within the

1 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,
2 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

3
4 IT IS SO ORDERED.

5 Dated: **December 13, 2021**

/s/ Eric P. Grogan
6 UNITED STATES MAGISTRATE JUDGE